

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

Court of Appeals No. 330345

Lower Court No. 15-001344 FH

-vs-

TARONE DEVON WASHINGTON

Defendant-Appellee.

BERRIEN COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant

MARILENA DAVID-MARTIN (P73175)

Attorney for Defendant-Appellee

DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Statement of Questions Presented

- I. Did the Court of Appeals correctly hold that maintaining a drug house, a public health code misdemeanor punishable by imprisonment for not more than 2 years, is not a “felony” for purposes of the penal code and cannot be used as the predicate felony for a felony firearm conviction?**

Defendant-Appellee answers, “Yes.”

Plaintiff-Appellant answers, “No.”

Judgment Appealed from and Relief Sought

It is undoubtedly tempting for this Court to grant relief on the Prosecutor's Application when the Court of Appeals invited such action. But this Court should not grant the Prosecutor's Application because the opinion of the Court of Appeals was sound. It is not in conflict with any prior Michigan jurisprudence, it is well-reasoned, and it reaches the correct result.

The prosecutor claims that the Court of Appeals violated the holding of *People v Smith*, 423 Mich 427 (1985) "by importing into the Penal Code . . . a misdemeanor label from the Public Health Code." (Appellant's Application, p. iv). The decision of the Court of Appeals did not conflict with the holding of *Smith* in any way. The Court of Appeals scrupulously honored the holding in *Smith* when it held that an offense labeled a "misdemeanor" in the Public Health Code could not be considered a "felony" for purposes of the Penal Code's felony firearm statute.

Maintaining a drug house is a Public Health Code misdemeanor punishable by imprisonment for not more than 2 years. MCL 333.7405(1)(d); MCL 333.7406. Felony firearm is a Penal Code offense, punishing the commission of an underlying felony committed while in possession of a firearm. MCL 750.227b.

MCL 333.7406 of the Public Health Code expressly designates maintaining a drug house as a "misdemeanor, punishable by imprisonment for not more than 2 years." The penalty provision of MCL 333.7406 satisfies both the definition of felony and the definition of misdemeanor under the Penal Code. It is punishable by "imprisonment in state prison" (definition of "felony," MCL 750.7), and it is

punishable by “imprisonment” (definition of “misdemeanor,” MCL 750.8). But it is a misdemeanor according to its own plain language.

And that designation does not at all conflict with the Penal Code’s definition of “misdemeanor.” It would be illogical to transform this offense to a felony under the Penal Code simply because it *could* satisfy the Penal Code’s definition of “felony” when it already satisfies the Penal Code’s definition of “misdemeanor.”

“If statutes can be construed in a manner that avoids conflict, then that construction should control the analysis.” *People v Webb*, 458 Mich 265, 274, 580 NW2d 884 (1998); *People v Williams*, 268 Mich App 416, 425–26; 707 NW2d 624, 630 (2005). Since the designation of maintaining a drug house as a misdemeanor offense “dovetail[s] harmoniously” with the Penal Code’s definition of misdemeanor, there is no justification for reclassifying it as a felony under the Penal Code. *People v Bewersdorf*, 438 Mich 55 (1991), internal cites omitted, (refusing to read statutes in conflict when another available reading allows the statutes to “dovetail harmoniously” with one another).

The Court of Appeals was correct in holding that maintaining a drug house (a Public Health Code misdemeanor offense by definition), cannot be transformed into a felony for purposes of a felony firearm offense (a Penal Code offense). This Court should deny leave to appeal.

Statement of Facts

Tarone Washington was inside of a home that he did not own, rent, lease, or live when police executed a search warrant on March 27, 2015 at 12:30 in the afternoon. Police had no idea what time Mr. Washington arrived at the home, whether he had stayed the night, whether he arrived just minutes before the execution of the warrant, or when he was last at the home prior to that date. (TI¹, 125, 186, 213). According to the prosecution's police witness, his last known specified connection to the home was five months prior to the date of the search warrant execution. (TI, 212-213). He was not connected to the home in any way other than being present on the date of the search warrant execution. A piece of mail addressed to Mr. Washington found in the home indicated that his address was elsewhere. (TI, 181-182; TII, 38).

After deploying a flash bang, which deploys bright lights and a loud noise as a means of disorientation, 15 police officers raided the home at 1291 Jennings in Benton Harbor, MI. (TI, 107, 113, 168). One officer described the home as "not very livable" and described the basement as having two or three "makeshift" bedrooms separated by walls. (TI, 114-115). Six people, including Mr. Washington, were in the home at the time. (TI, 171).

Mr. Washington did not own the home and there was no evidence presented at trial to establish that he lived there or that he had control over the home. (TI, 185). Police identified the home owner and discovered that the home was being

¹ TI refers to Volume I of the Trial Transcript, August 20, 2015; TII refers to Volume II of the Trial Transcript, August 21, 2015.

rented out; police did not determine who the home had been rented out to. (T I, 209-210).

The prosecution's entire case rested on the testimony of 5 out of the 15 police officers involved in the execution of the warrant and the collection of evidence. (TI, 168). Police found drug paraphernalia and contraband throughout the home, including in the makeshift southeast basement bedroom where Mr. Washington, cooperative and compliant, was standing, fully clothed, at the time of the execution of the warrant. In the southeast bedroom, police found a closed duffel bag containing clothes and a firearm, \$2,000 in cash in a sock inside of the second dresser drawer, \$60 in a top dresser drawer, a scale with cocaine and marijuana residue, and a \$10 bag of marijuana for personal consumption. (TI, 115-116, 171, 175, 181, 197; TII, 35-36, 39). A piece of six-month old mail addressed to Mr. Washington at a different address (160 Hastings Avenue, Benton Harbor, MI) was found in the second dresser drawer. (TI, 181-182; TII, 38). The bed in the southeast bedroom was covered in piles of clothes, a comforter, sheets, and pillows. (TII, 46). In an upstairs bedroom on the main floor, police found spoons and crack pipes containing cocaine residue. (TI, 141-144; TII, 35)

There were five other people in the home, none of whom testified at trial. (TI, 171). The police found no residency papers linking Mr. Washington to the 1291 Jennings address. (TI, 189).

The basis for the search warrant in this case was a controlled buy that took place at an unspecified date and time. (TI, 203-206). Mr. Washington had \$300 cash

in his pants at the time of his arrest. (TI, 172-173; TII, 42). At trial, Officer Sean Solard testified that \$20 in marked buy money was found in Mr. Washington's pant pocket. (TII, 42). At the preliminary examination, Officer Solard testified that \$20 "amongst" the \$2,000 found in the dresser drawer was "marked buy money." (TII, 54-55). There was no testimony as to when this controlled buy took place, or who was involved in the controlled buy.

The police investigators admitted to not knowing much about the circumstances relating to the charges in this case. Police admitted that they:

- Do not know how long Mr. Washington was in the home that day. (TI, 125, 186, 213).
- Do not know the last time before March 27th that Mr. Washington was in the home. (TI, 196).
- Do not know how long anybody was in the basement that day before search warrant was executed. (TI, 187).
- Do not know how long the duffle bag was in the bedroom before the execution of the search warrant. (TI, 122, 191; TII, 57).
- Do not know who brought the duffel bag into the house or how long it was there. (TI, 122, 211; TII, 57).
- Do not know whose clothes were in the duffle bag or dresser. (TI, 196).
- Do not know how anything in the bedroom got there or who brought it there or when. (TI, 126).
- Do not know if Mr. Washington had a key to the home. (TI, 196).
- Do not know who lived in the home. (TI, 209-210).

Detective Ian Dodd could only testify that he knew from "intelligence" that Mr. Washington was "present" in the house at some point during October of 2014.

(T I, 212). Detective Dodd could not say if or how many nights Mr. Washington stayed in the house between October 2014 and March 2015. (T I, 213). Detective Dodd did not know if Mr. Washington was there the night before the incident or when he arrived that day. (T I, 213).

Mr. Washington was charged with operating and maintaining a drug house (count I), felony firearm (count II), possession of marijuana (count III) and receiving and concealing a stolen firearm (count IV). At the close of the prosecution's case, defense counsel moved for a directed verdict as to all counts based on insufficiency of the evidence. (TII, 69-71). Counsel argued that the evidence presented did not satisfy the elements of operating and maintaining a drug house as required. There was no evidence of continuity as continuity cannot be shown by a single incident of drug use or possession. (TI, 69-70). Without any residency papers linking Mr. Washington to the home, the prosecution at most proved that Mr. Washington was a guy in a house where drugs were found, which is not sufficient to establish that he was maintaining a drug house. (TI, 72).

As to the felony firearm and receiving and concealing a stolen firearm counts, counsel argued that Mr. Washington's mere proximity to the recovered weapon was not enough to establish possession or knowledge that the gun was present. (TII, 70). None of the officers knew when or how the duffel bag was sitting in this alleged drug house where there were a number of individuals. (TII, 71).

As to the possession of marijuana charge, counsel argued that there was no evidence linking Mr. Washington to the marijuana as officers were less than clear about where the \$10 bag of marijuana was first discovered. (TI, 72).

The trial court denied the motion for directed verdict. (TII, 75-76). Mr. Washington was convicted of all charges.

Appellate Question at Issue

In the charging instrument, the prosecution identified the only predicate felony for the felony firearm charge (Count 2) as the high court misdemeanor of maintaining a drug house (Count 1):

<p>STATE OF MICHIGAN, COUNTY OF BERRIEN</p> <p>IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:</p> <p>CT.1: did knowingly or intentionally keep or maintain a dwelling, that was frequented by persons using controlled substances in violation of article 7 of the public health code, being MCL 333.7101 et seq, for the purpose of using controlled substances ; Contrary to MCL 333.7405(1)(d) and MCL 333.7406; [333.7405D]</p> <p>MISDEMEANOR: 2 Years and/or \$25,000.00. Unless sentenced to more than 1 year in prison, the court shall impose license sanctions pursuant to MCL 333.7408a; court shall order law enforcement to collect DNA identification profiling samples and order defendant to pay \$60.00 assessment.</p> <p>CT.2: did carry or have in his/her possession a firearm, to-wit: a pistol, at the time he/she committed or attempted to commit a felony, to-wit: Maintaining a Drug House; Contrary to MCL 750.227b; [750.227B-A]</p> <p>FELONY: 2 years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction; court shall order law enforcement to collect DNA identification profiling samples and order defendant to pay \$60.00 assessment.</p> <p style="text-align: right;">SH EN 015 M</p>
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The Court of Appeals held that maintaining a drug house cannot be considered a felony under the Penal Code, and therefore, cannot be the underlying felony supporting a felony firearm conviction. (Appendix A to Plaintiff-Appellant's Application). The court vacated Mr. Washington's felony firearm conviction on these grounds, and the prosecution appealed.

- I. The Court of Appeals correctly held that maintaining a drug house, a public health code misdemeanor punishable by imprisonment for not more than 2 years, is not a “felony” for purposes of the penal code and cannot be used as the predicate felony for a felony firearm conviction.

Issue Preservation

Trial counsel did not object to this error. This error is plain² and does not require preservation for appellate review.

Standard of Review

Questions of statutory interpretation are reviewed de novo. *People v Hill*, 486 Mich 658, 665-66 (2010). Non-constitutional unpreserved errors are reviewed for plain error affecting substantial rights, seriously affecting the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763 (1999).

Introduction

The prosecutor charged Mr. Washington with felony firearm and listed the predicate felony offense as maintaining a drug house. The jury ultimately found him guilty of maintaining a drug house and of felony firearm. The prosecution also sought to enhance Mr. Washington’s maintaining a drug house sentence as a second habitual offender.

² Should this Court disagree that the error is plain, Mr. Washington asks this Court to remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), so that he may pursue an ineffective assistance of counsel claim.

Maintaining a drug house is a Public Health Code misdemeanor punishable by imprisonment for not more than 2 years. MCL 333.7405(1)(d); MCL 333.7406. Felony firearm is a Penal Code offense, punishing the commission of an underlying felony committed while in possession of a firearm. MCL 750.227b.

Discussion

Mr. Washington's felony firearm conviction is invalid and must be vacated where the predicate "felony" supporting the felony firearm offense is expressly designated a misdemeanor and qualifies as such under the Penal Code.

Our courts have already held that high court misdemeanors³ may be considered felonies for purposes of the habitual offender enhancement provisions⁴ of the Code of Criminal Procedure. *People v Smith*, 423 Mich 427, 445 (1985) (finding Penal Code high court misdemeanor is a felony for purposes of habitual offender enhancement); *People v Primer*, 444 Mich 269, 275 (1993) (finding Public Health Code high court misdemeanor is a felony for purposes of habitual offender enhancement). By its nature, the penalty provision of a high court misdemeanor unambiguously satisfies the definition of "felony" within the Code of Criminal Procedure, which is defined as an offense punishable by more than 1 year imprisonment. MCL 761.1(g); *Smith*, 423 Mich at 443; *Primer*, 444 Mich at 275.

But the Court of Appeals has also held that a high court misdemeanor expressly designated as a misdemeanor in the Penal Code cannot be considered a felony for purposes of a felony firearm conviction under the Penal Code. *People v*

³ The term "high court misdemeanor" refers to any offense labeled a misdemeanor and punishable by imprisonment for not more than 2 years.

⁴ MCL 769.10 *et seq.*

Baker, 207 Mich App 224, 225 (1994). Whether an offense is a “felony” under the Penal Code does not depend on the penalty provision of the statute, even if the offense is punishable by more than one year imprisonment. *Id.* Under the Penal Code, it is the express designation of the offense as a “misdemeanor” or “felony” that is determinative. *Id.*

Whether a *Public Health Code* high court misdemeanor qualifies as a felony under the Penal Code is question of first impression.

- A. *A Public Health Code high court misdemeanor may not be treated as a “felony” for purposes of the Penal Code.*

Under the Penal Code and Public Health Code, whether an offense is a misdemeanor or felony depends on the specific designation of the offense. The Public Health Code does not define the terms “felony” or “misdemeanor” and simply designates offenses as one or the other. The Penal Code defines a felony as an offense “punishable by death or imprisonment in state prison.” MCL 750.7. A misdemeanor is defined as “any act or omission, not a felony, . . . punishable according to law, by a fine, penalty, or forfeiture, and imprisonment.” MCL 750.8.

Under both the Penal Code and the Public Health Code, it is not uncommon for felonies and misdemeanors to share identical penalty provisions. For example, there are a number of misdemeanors *and* felonies within the Penal Code that are

“punishable by imprisonment for not more than 2 years.”⁵ Similarly, in the Public Health Code, there are a number of misdemeanors *and* felonies that are “punishable by imprisonment for not more than 2 years.”⁶

Under the Public Health Code and the Penal Code, it is the express designation of the offense as a “misdemeanor” or “felony” that is determinative; the penalty provision is not controlling. *Baker*, 207 Mich App at 225.

To the contrary, the Code of Criminal Procedure relies solely on the penalty provision of a statute to determine whether an offense is a felony. The Code of Criminal Procedure defines felony as a violation punishable “by death or by imprisonment for more than 1 year.” MCL 761.1(g). A misdemeanor is defined as a violation that “is not a felony, or a violation . . . that is punishable by imprisonment” or by a non-civil fine. MCL 761.1(h).

True to its definitional structure, there is no such thing as a high court misdemeanor within the Code of Criminal Procedure. The Code of Criminal Procedure does not contain offenses labeled “misdemeanors” that are punishable by more than 1 year; nor does it contain offenses labeled “felonies” that are punishable by less than 1 year. (See Table 1, below, for an illustration of the statute variances).

⁵ **Misdemeanors:** MCL 750.90e; 145n(3); 145p(1)&(2); 157b(3)(b); 217c(3); 224a(6); 224d(2); 227c; 303(1); 335a(2)(b); 372(3); 411; 414; 478a(2); 479c(2)(c); 520e(2); **Felonies:** MCL 750.16(1); 18(3); 50c(7); 81c(2); 81d(1); 81e(2); 90h; 131(3)(b)(ii); 131(3)(c); 131a(1); 131a(2); 136b(6); 145d(2)(b); 147b(2); 157s(1)(b)(ii); 157s(1)(c); 160b; 195(1); 197(1); 217b(2); 217e(2); 217f(3); 230; 300; 303(6); 411s(2)(a); 451(3); 465a(1)(b); 479(2); 479a(2); 508(2)(b); 520n(2); 539d(3)(a)(i); 539j(2)(a)(i); 540(5)(a).

⁶ **Misdemeanors:** MCL 333.7406; 8507(1)(c); 13738(3); **Felonies:** MCL 333.7401(8); 7401(2)(e), 7402(d); 7403(2)(b)(ii); 17748d(2); 17764(3); 1766b(2)(b).

Table 1: Codes, Statutes, Definitions			
	Public Health Code	Penal Code	Code of Criminal Procedure
Statute	Maintaining a drug house MCL 333.7405/6	Felony firearm MCL 750.227b	Habitual enhancement MCL 769.10 <i>et seq.</i>
Relevant text of statute	The commission of the offense is a “misdemeanor punishable by imprisonment for not more than 2 years.”	The possession of a firearm when a person commits “a felony” is punishable by a consecutive sentence for the sentence “imposed for the conviction of the felony.”	If a person commits a “subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter.”
Definition of “felony”	N/A	Punishable by death or imprisonment in state prison. MCL 750.7	Punishable by “imprisonment for more than 1 year.” MCL 761.1(g)
Definition of “misdemeanor”	N/A	Not a felony, and punishable by a fine, penalty, or forfeiture, and imprisonment. MCL 750.8	Not a felony and punishable by imprisonment or a non-civil fine. MCL 761.1(h)
Shared penalties for felonies and misdemeanors	Yes	Yes	No

Our Legislature has intentionally chosen to define a “felony” differently among the Public Health Code, Penal Code, and Code of Criminal Procedure. In the

Penal Code and Public Health Code, the Legislature chose to designate offenses punishable by imprisonment for not more than 2 years as both "misdemeanors" and "felonies" depending on the offense. This scheme is consistent with the definitional structure of code, which does not depend on the penalty provision to define the status of an offense.

Here, MCL 333.7406 of the Public Health Code expressly designates maintaining a drug house as a "misdemeanor, punishable by imprisonment for not more than 2 years." The penalty provision of MCL 333.7406 satisfies both the definition of felony and the definition of misdemeanor under the Penal Code. It is punishable by "imprisonment in state prison" (definition of "felony," MCL 750.7), and it is punishable by "imprisonment" (definition of "misdemeanor," MCL 750.8). But it is a misdemeanor according to its own plain language. And that designation does not at all conflict with the Penal Code's definition of "misdemeanor." It would be illogical to transform this offense to a felony under the Penal Code simply because it *could* satisfy the Penal Code's definition of "felony" when it already satisfies the Penal Code's definition of "misdemeanor."

"If statutes can be construed in a manner that avoids conflict, then that construction should control the analysis." *People v Webb*, 458 Mich 265, 274, 580 NW2d 884 (1998); *People v Williams*, 268 Mich App 416, 425–26; 707 NW2d 624, 630 (2005). Since the designation of maintaining a drug house as a misdemeanor offense "dovetail[s] harmoniously" with the Penal Code's definition of misdemeanor, there is no justification for reclassifying it as a felony under the Penal Code. *People*

v Bewersdorf, 438 Mich 55 (1991), internal cites omitted, (refusing to read statutes in conflict when another available reading allows the statutes to “dovetail harmoniously” with one another).

Maintaining a drug house, a “misdemeanor punishable by imprisonment for no more than 2 years,” is a misdemeanor under the Public Health Code and Penal Code.

As explained above, the Penal Code defines “felony” differently from the Code of Criminal Procedure and regularly assigns penalty provisions to “felonies” and “misdemeanors” that do not satisfy the definitional structure of the Code of Criminal Procedure. It logically follows that what is considered a felony for the purposes of one code, may not necessarily be considered a felony for purposes of the other code. Whenever possible, offenses must be treated consistent with the definitions of the code at issue, regardless of how that offense might be treated in another code.

Maintaining a drug house, even if subject to a second habitual offender enhancement, remains a misdemeanor under the Penal Code because its designation as a misdemeanor is consistent with the definitions of the Penal Code and because the enhancement does not change the nature of the offense. Mr. Washington’s felony firearm conviction must be vacated as it is not supported by a sufficient predicate felony.

Request for Relief

Mr. Washington requests that this Court deny the prosecutor's Application for Leave to Appeal. The Court of Appeals opinion was correctly decided.

Respectfully submitted,

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